APPENDIX AA

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

THE KROGER CO., *Employer* and ALLEN ALSIP, *Petitioner* and RETAIL CLERKS UNION, LOCALS 1550, 1540, 1504, 1460, 1453, AND 98 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, *Unions*	Case No. 13-RD-494

DECISION AND ORDER

Upon a petition and an amended petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Albert Kleen, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.

3. No question affecting commerce exists concerning the representation of employees of the Employer within the

meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act for the reasons stated below:

The Petitioner seeks to decertify the above-named Unions in a single-employer unit consisting of certain employees employed in all of the Employer's stores located in the Chicago Metropolitan District. The Employer and United Retail Workers Union, Intervenor, in agreement with the Petitioner, assert that this single-employer unit is appropriate. Intervenor Retail Clerks International Association, AFL-CIO, hereinafter called International, and Retail Clerks Union, Locals 1550, 1540, 1504, 1460, 1453 and 98, hereinafter called Locals, contend that only a multiemployer unit is appropriate.

The essential facts are as follows:

On March 8, 1962, the Locals affiliated with the International filed charges in Case No. 13-CA-4742 alleging that the Employer violated Section 8(a)(5) and (1) by refusing to be bound by, and by refusing to sign a collective-bargaining agreement reached in joint bargaining with a group of retail grocery store operators. On the following day, the Petitioner filed the instant decertification petition naming the International as the union currently recognized, and describing the appropriate unit as all employees including part-time employees in the stores of the Employer's Chicago Metropolitan District, excluding store manager, meat department employees, guards, and all professional and supervisory employees as defined in the Act.

On May 4, 1962, a complaint issued in Case No. 13-CA-4742, alleging, *inter alia,* that the Employer was a member of the multiemployer bargaining unit. On May 9, 1962, on the basis of this allegation in the complaint, the Regional Director dismissed the instant decertification petition as seeking an election in an inappropriate unit. Thereafter,

the Petitioner filed with the Board a Request for Review of this dismissal.

On March 18, 1963, the Board issued its Decision and Order[1] in Case No. 13-CA-4742, finding that the Employer had exercised a prerogative established by past practice in insisting on individual bargaining as to certain matters, and had not, therefore, violated Section 8(a)(5) and (1) by refusing to be bound by or to sign the collective-bargaining agreement which had been jointly negotiated by the Locals and the employers' group. The Board, however, found it unnecessary to decide in that case whether the parties' practice of individual adjustments precluded their having established an appropriate multiemployer unit.[2]

Thereafter, on March 26, 1963, the Board reversed the Regional Director's dismissal of the instant decertification petition and ordered a hearing thereon. On August 28, 1963, the Petitioner amended the petition by substituting the Locals as the unions currently recognized and sought to be decertified. On September 28, 1963, a hearing was held on the petition, during which hearing the parties stipulated that the entire record in *The Kroger Co.*, 141 NLRB 564, be incorporated into and be made a part of the instant proceeding.

The record shows that since 1945, the Employer, together with other retail grocery stores operating in and about Chicago, has bargained collectively with the Locals on a group basis.[3] Although they have no formal association,

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[1] *The Kroger Co.*, 141 NLRB 564, affirmed 330 F. 2d 210 (C.A. D.C.).

[2] 141 NLRB at p. 569, footnote 4.

[3] In 1945, the employer group consisted of the Employer, Atlantic & Pacific Tea Co., National Tea Company, and Associated Food Retailers, an association of local independently owned retail food

constitution, dues, fees, or binding rules of procedure, the employers have bargained together for many years. The Locals usually submitted contract proposals to individual employers who then met as a group with the Locals. Each employer was represented by one or more individuals who caucused prior to meeting with the Locals to discuss the Locals' proposals and to agree upon a common response. One representative then assumed the role of spokesman for the employer group. As a result of these joint negotiations, separate but substantially similar collective-bargaining agreements were executed between the Locals and respective employers. While these past contracts have been substantially similar in the 17-year period, there have been 14 individual adjustments between separate employers and separate Locals which caused some variation in the terms and conditions of the jointly negotiated contracts.

In the fall of 1961, notices of contract reopening were, as usual, served upon the employers. At the first negotiating session the Locals proposed, *inter alia*, a pension plan. The spokesman for the employer group informed the Locals that the instant Employer and A & P had pension plans of their own for their employees and would not be interested in one which was jointly administered. Throughout the following ten bargaining sessions (from November 11, 1961, to February 16, 1962), both sides continued to bargain but remained firm in their positions concerning the pension plan. At the 12th bargaining session held on February 22, 1962, the spokesman for the group informed the Locals that although

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stores. In 1955, Eagle-Piggly Wiggly, and in 1961, Red Owl Stores joined the group.

Although there were other locals participating in joint negotiations during the early history of bargaining, the union group was reduced to the six locals due to the merger of several smaller locals. All six of the locals are members of Retail Clerks Chicago Area Council, District 3, except Local 1460, which is a Gary, Indiana, Local.

all of the employers were willing to make certain wage adjustments, some of them were unwilling to agree to a pension plan. The Locals' representative then took the position that the parties were bargaining jointly and each member of the group would be bound by any agreement reached. At the next meeting, on February 24, 1962, when the Locals' representative reiterated the unions' position, the Employer's representative stated categorically that no other employer representative was authorized to accept any agreement on the Employer's behalf which included pension proposals, that the Employer would be bound only by an agreement to which it specifically assented, and that it would not agree to a contract which included a pension plan. At this same meeting, which continued on to February 25, the Locals and the remaining employers reached agreement on terms of a new contract, including a pension plan. The Employer's representative, however, refused to accept the pension proposal, stated that the Employer was anxious to reach a settlement with the Locals, proposed as a basis of settlement the same agreement reached by the other parties with the exception of a pension plan, and also expressed the Employer's willingness to meet further with the Union to bargain for a wholly new agreement in an attempt to reach a settlement. Thereupon, the Employer's representative left the meeting. On April 12, 1962, the Locals and all participating employers save the Employer held a further meeting for the purpose of conforming certain contract items. The Employer's representative, although invited, did not attend this meeting. Thereafter, within a 2-day period, all parties except the Employer executed a contract. Following the meeting of February 24-25, the Employer and the Locals met and unsuccessfully attempted to resolve the issue as to the pension plan.[4] Because they were unable to reach an agreement, the Locals struck the Employer on April 19, 1962.

[4] Meetings between representatives of the Employer and the Locals were held on March 5, April 18, and May 3, 1963.

On June 9, 1962, the Employer and the Locals executed a strike-settlement agreement. This agreement provided, *inter alia*, that the Employer and the Locals would execute a collective-bargaining agreement containing all of the terms and conditions contained in the contract between the Locals and the other employers with exception of the pension plan and reserved this issue to the ultimate outcome, including appeals, of the litigation in the unions' unfair labor practice case against the Employer (Case No. 13-CA-4742).[5] On July 2, 1962, the Locals and the Employer executed a collective-bargaining agreement in accordance with the terms of their strike-settlement agreement. With regard to the pension plan, this agreement provided, in effect, that the Locals' pension proposal would be included in the contract if it is finally ruled "that the Employer should have executed or is required to execute a collective-bargaining agreement substantially similar to that signed by" the other employers.

As stated above, the Petitioner contends that only a single-employer unit is appropriate and that a multiemployer unit never existed. In this regard, the Petitioner argues that the past bargaining history shows that the Employer never gave the employer group the power to negotiate for and to bind it and had not unequivocally manifested a desire to be bound by group rather than individual action. Petitioner further contends that the history of individual adjustments negates the establishment or existence of a multiemployer unit. We do not agree. The necessary implication of this argument is that in multiemployer bargaining a union and an individual employer member of the group are automatically precluded from negotiating separately on limited matters of peculiar concern to the individual employer, unless

[5] On January 3, 1964, the United States Court of Appeals for the District of Columbia dismissed the petition filed by the Locals and the International to review and set aside the Board's dismissal of the complaint against the Employer (141 NLRB 564) and affirmed the Board's order in that case. 330 F. 2d 210.

such employer withdraws from the group. This is patently unrealistic. The problems of each member of a multiemployer group are understandably not always identical. While it may be to the best interest of the employers and labor organizations involved to bargain as a group about all matters of general concern—the obvious reason for the formation and continuation of any multiemployer unit—it may likewise be in the best interest of all concerned not to burden the group negotiations with the limited problems of an individual employer. Hence, we do not believe that the exercise of a mutually recognized privilege to bargain individually on limited matters, as in the present case, is inconsistent with the concept of collective bargaining in a multiemployer unit.[6] Moreover, to hold that such limited separate bargaining invariably negates the existence of, or destroys, an established multiemployer bargaining unit would be to grant to an employer all the benefits of multiemployer bargaining without assuming any of its concomitant obligations.

We have repeatedly held that a multeimployer unit is appropriate in circumstances such as are here present, even though the employer may not have specifically delegated to an employer group the authority to represent it in collective bargaining or given the employer group the power to execute final and binding agreements on its behalf,[7] or where some of the contracts have not been signed by all members of the group.[8] What is essential is that the employer mem-

[6] In this respect the situation is not unlike the one where bargaining in a multiplant unit leaves certain matters for local determination at each separate plant. Cf. *General Motors Corporation*, 120 NLRB 1215, 1220-1221 and cases cited in footnote 10 thereof.

[7] *Quality Limestone Products, Inc.*, 143 NLRB No. 62, pp. 4-5; *Krist Gradis, et al.*, 121 NLRB 601, 610; *Cleveland Builders Supply Co., et al.*, 90 NLRB 923, 924; *Bellingham Automobile Dealers*, 90 NLRB 374.

[8] *Krist Gradis, et al., supra; Capitol District Beer Distributors Association, et al.*, 109 NLRB 176; *Fish Industry Committee*, 98 NLRB 696.

ber has indicated from the outset an intention to be bound in collective bargaining by group rather than by individual action.[9]

Here, the facts clearly show such an intention on the part of the Employer. We do not believe that the Employer could, or did, rely upon the past bargaining history of some individual negotiations to the extent of assuming, except for limited matters, that it would not otherwise be bound by group action. In fact, to the contrary, it indicated its intent and willingness to be so bound. As noted above, after the Locals and the remaining members of the employer group reached an agreement, the Employer, although willing to bargain with the Locals for a wholly new agreement, was still willing to accept all of the terms and conditions of this agreement, except the pension plan, which all of the parties, including the Employer, reached as a result of joint negotiations. The fact that in past bargaining over a 17-year period 14 limited individual adjustments arose from apparently dozens of agreements, all of which were jointly negotiated, does not, in itself, establish a future unequivocal intent not to be bound by group action generally. Nor do we reach a different conclusion because of the reservation as to the Locals' pension proposal contained in the collective-bargaining agreement entered into by the Locals and the Employer on July 2, 1962. We find this reservation to be nothing more than an exercise of the Employer's privilege, acquiesced in by the Union, to insist upon limited separate negotiations, which privilege, we have already stated, is consistent with the concept of multiemployer bargaining. Accordingly, on the basis of the above facts and on the record as a whole, we find that the Employer had indicated an intention to be bound in collective bargaining by group rather than by individual action.

[9] *Capitol Beer Distributors Association, et al., supra* at 179.

The Petitioner also contends, as does the Employer,[10] that even if a multiemployer unit exists, the Employer timely and effectively withdrew from such unit on February 25, 1962. We do not agree. The record establishes that the Employer evinced no clear intent actually to withdraw from joint bargaining until the last bargaining session on February 25, 1962, and shortly before the Locals and the employer group reached an agreement.[11] Although the Employer had indicated prior to this time that it was not interested in the Locals' pension proposal, the Employer neither sought nor obtained the Union's consent to its withdrawal from multiemployer bargaining,[12] but, on the contrary, continued to engage in group bargaining thereafter without manifesting any intent to withdraw from the group or giving the Locals any clear indication that the employer group was not bargaining in behalf of the Employer.

Nor is the Employer's withdrawal or Union acquiescence therein demonstrated by the conduct of the Locals and the Employer in subsequently entering into separate negotiations with respect to the pension proposal. This action was entirely consistent with the parties' mutual understanding

[10] The Employer also contends that in *The Kroger Co.*, the Board adopted the Trial Examiner's finding to the effect that on February 25, 1962, the Employer "withdrew from such [joint] negotiations" (141 NLRB at p. 571), and that the Board is therefore estopped from now finding otherwise. We do not agree. A reading of that case clearly shows, contrary to the Employer, that the Board adopted the findings, conclusions and recommendations of the Trial Examiner only "insofar as they are consistent" with the Board's findings and conclusions, and that the Trial Examiner's finding in this regard was not adopted because it was inconsistent with those findings and conclusions.

[11] For a similar holding on almost identical facts, see *Anderson Lithographic Company, et al.*, 124 NLRB 920, enfd. sub. nom. *N.L.R.B.* v. *Jeffries Banknote Company*, 281 F. 2d 893 (C.A. 9).

[12] It is also clear from the record that the Employer gave no notice to any other members of the employer group that it intended or desired to withdraw from the group.

that individual variances could be negotiated by individual parties. As we have stated above, such individual bargaining of a limited nature is not inconsistent with the concept of bargaining in a multiemployer unit.

Based on the above, we find that the Employer, by attempting without the Union's consent [13] to abandon group negotiations shortly before an agreement had been reached, did not withdraw from multiemployer bargaining in a timely and effective manner, and therefore continued to remain a member of the multiemployer unit.[14]

Accordingly, we find that only a multiemployer unit is here appropriate, and that a single-employer unit limited to the petitioned-for employees employed in all of the Employer's stores located in the Chicago Metropolitan District is not appropriate, and we shall dismiss the petitions herein.[15]

ORDER

IT IS HEREBY ORDERED that the petitions filed herein be, and they hereby are, dismissed.

Dated, Washington, D. C., Aug. 27, 1964.

FRANK W. MCCULLOCH, *Chairman*
JOHN H. FANNING, *Member*
GERALD A. BROWN, *Member*
(SEAL) NATIONAL LABOR RELATIONS BOARD

[13] *Ice Cream Council, Inc.*, 145 NLRB No. 71. Although Member Brown does not rely upon the cited decision he agrees that there was no effective withdrawal in this case.

[14] *McAnary & Welter, Inc.*, 115 NLRB 1029, 1031; *The Milk and Ice Cream Dealers of the Greater Cincinnati, Ohio, Area, et al.*, 94 NLRB 23, 25; Cf. *Detroit Window Cleaners Union, Local 139*, 126 NLRB 63; Accord: *Cosmopolitan Studios, Inc.*, 127 NLRB 778, 779, enfd. 291 F. 2d 110 (C.A. 2); *Walker Electric Co.*, 142 NLRB 1214.

[15] Inasmuch as we have dismissed the petitions herein because they sought to decertify an inappropriate unit, we deem it unnecessary to reach or consider the various contentions raised by the Locals and the International with respect to the contract bar issue.

Members LEEDOM and JENKINS dissenting:

In dismissing the petition herein, our colleagues have found that a multiemployer unit existed and that the Employer did not effectively withdraw from that unit. Based thereon, our colleagues have further found that the Petitioner, by seeking a decertification election in a single-employer unit, filed his petitions in an inappropriate unit. We do not agree. The proper determination of this case depends, we believe, upon the correct answer to the basic point of inquiry of whether the group bargaining arrangements involved herein were understood by the parties to be binding on each other and to require contract uniformity under all circumstances, thereby establishing a multiemployer bargaining unit.

It is clear that because multiemployer bargaining is and always has been consensual in nature [16] the Board cannot create multiemployer units, but may only recognize them as appropriate once they come into being through the express or implied intent of the parties. Here, the record clearly shows that the several employers, including the Employer, never expressly conferred upon the group of employers the power to bind them by negotiations.[17] The necessary intent, then, if it is to be found, must be implied from the group's and the Employer's course of conduct. In our view, no such implication is warranted. To the contrary, the record shows that on 14 separate occasions in the past employers departed from joint negotiations and entered into separate bargaining with the apparent approval of the other employers and of the Locals. It is obvious, therefore, that the parties understood that their bargaining arrangements did not require contract uniformity. In addition, since these acquiesced-in departures resulted in separate, dissimilar agreements, it is

[16] *Rayonier, Inc.*, 52 NLRB 1269, 1274-1275.

[17] *Bennett Stone Company*, 139 NLRB 1422, 1424; *California Metal Trades Association*, 72 NLRB 115.

also obvious that no party was "locked in" during the negotiation of agreements. It is of no moment that the separately negotiated agreements were substantially similar to those reached as a result of group action. The test is not one of degree, but rather one of intent. Accordingly, we believe that these departures which continued over a substantial period of time and which resulted in dissimilar agreements warrant the conclusion that the employers never intended to be bound in the future by group rather than by individual action.[18]

Further, the evidence clearly shows that the Locals were not misled in any way as to the Employer's position on the question of whether the group could bind the Employer on the pension issue. Here, the employer group and the Locals knew throughout the entire course of bargaining that the Employer opposed the pension proposal. The Locals also knew, based on past practice, that if the Employer's intent not to be bound by the results of the jointly negotiated agreement containing the pension proposal was further manifested by its refusal to agree to such agreement, the usual procedure would be to divorce the Employer from the group and to negotiate separately on this subject. We are, therefore, satisfied that the Employer took clear and timely steps throughout to apprise the Union of its position and that by adopting an individual course of action, the Employer did not deviate from the established procedure of bargaining.[19] Accordingly, in the light of the past bargaining practices and the present bargaining situation, we would find that such group bargaining as took place was for the convenience

[18] *Bennett Stone Company, supra,* at 1424; *Morgan Linen Service,* 131 NLRB 420, 422; *Chicago Metropolitan Home Builders Association, supra.*

[19] *The Kroger Co.,* 141 NLRB 564; compare, for example, *Quality Limestone Products, Inc.,* 143 NLRB No. 62, where the Board stated: "... they (the employers) have never taken any steps to adopt an individual course of action prior to the positions taken during the course of this proceeding. ..."

of the employers and unions involved, and was not undertaken with the intention of establishing a multiemployer unit.

It logically follows that as a multiemployer unit did not exist, there was no necessity for the Employer to "withdraw" from such nonexistent unit. Accordingly, we would not dismiss the petition, but would, instead, direct an election in the petitioned-for unit limited to employees of the Employer.

Dated, Washington, D. C., Aug. 27, 1964.

BOYD LEEDOM, *Member*
HOWARD JENKINS, JR., *Member*
NATIONAL LABOR RELATIONS BOARD